# No. 11,514

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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COLGATE-PALMOLIVE-PEET COMPANY,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L., et al.,
*Intervenors,*

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO),
*Intervenor,*

and

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

COLGATE-PALMOLIVE-PEET COMPANY,
*Respondent.*



## REPLY BRIEF FOR PETITIONER, COLGATE-PALMOLIVE-PEET COMPANY.

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## REPLY BRIEF FOR PETITIONER, COLGATE-PALMOLIVE-PEET COMPANY.

### I.

### INACCURACIES IN THE BOARD'S STATEMENT OF THE FACTS.

In this portion of our brief we call attention to inaccuracies in the Board's Statement of the Facts

which result from misstatements of the record or from reliance on only part of the record, or both.

(a) At page 6 of the Board's brief, the following appears:

> "Dissatisfaction with the representation accorded them by the C.I.O. had been brewing among the employees for about six months before the extension of the closed-shop agreement."

This statement is inaccurate because it ignores part of the record. The Board fails to state that there is nothing in the record to indicate that the Petitioner learned of this alleged dissatisfaction prior to the time that the telegrams, which are in evidence as the Board's Exhibits 5 and 6, were dispatched and received. This statement, set forth as it is without explanation, could give rise to the inference that the employer had knowledge of such dissatisfaction prior to the time above mentioned.

(b) At page 6 of the Board's brief, the following is stated:

> "On July 20, 1945, four days before the execution of the extension of the collective agreement, Steward Marshall in a conversation with B. W. Railey, the employer's vice-president, asked that the five stewards be present when the extension was signed *because of impending labor troubles at the plant due to the employees' unrest.*" (Italics ours.)

The foregoing is a misstatement of the record. The record is clear that Steward Marshall did not tell Mr. Railey that the five stewards desired to be present

when the extension was signed "because of impending labor troubles at the plant due to the employees' unrest." This is what Mr. Marshall said:

> "I asked him if the contract of the Union was to be signed that the stewards of Colgate-Palmolive-Peet be present, and he asked me why, and I said that we expected some trouble to rise at that time. And he said he would." (R. 188-189.)

This is a far cry from saying that there were "impending labor troubles at the plant due to the employees' unrest."

It is evident that this is another effort on the part of the Board to bring home knowledge to the Petitioner of employee unrest prior to the time of the transmittal and receipt of the telegrams, and prior to the occurrence of the strike, notwithstanding the fact that there is nothing in the record to sustain such a contention.

(c) At page 9 of the Board's brief, there is set forth a warning bulletin issued by the C.I.O. at the plant, and the Board fails to mention that there is no evidence that the Petitioner had knowledge of this notice or its contents. In setting forth this notice without this explanation, the Board again attempts to give the impression that the Petitioner knew, before the discharge of the four Committeemen, of the fact that the CIO had threatened those who attended the meeting with loss of membership and employment.

(d) At pages 11 and 12 of the Board's brief, the Board gives its version of the interview between the employer's representative, the CIO officials and the

four Committeemen, but renders it totally inaccurate by stating in connection therewith only a part of what appears in the record. The Board places emphasis on part of a sentence carefully culled from the record. The Board states:

> "Vice-President Railey in his testimony agreed that 'it became quite apparent as this conversation took place that there was a schism developing in the ranks of the CIO'."

The record is as follows:

> "Q. Well, it became apparent as this conversation took place that there was a schism developing in the ranks of the CIO, of the ILWU, did it not, at the plant?
>
> A. It certainly was, at least between the CIO *and certain individuals.* Whether it was, what percentage * * *". (Italics ours.)
>
> (R. 545-546.)

The Board not only has indulged in the culling to which we have called attention but has also failed to make any mention of the actual substance of the exchange between CIO officer Lynden and Committeeman Sherman, and, for this reason, it will do no harm to restate a portion of the statement made by Mr. Lynden, as testified to by Mr. Railey:

> "A. I don't know what is the right word to use for it. As I say, they were reminded of their oath, and of course, Mr. Sherman, who was speaking for the negotiating committee, accused the Union of failure to get increases for the men and for the people working there. And Mr. Lynden for the Union did bear down to the extent that

they had taken an oath, and they had failed to observe it, and he pointed out what happened to a traitor for the United States, and they were a traitor to their Union, that they had the right to discipline their people. *In fact, he said—this was when the war was still on—he said they had many times been called upon to discipline people, keep them working.* And he said even in the shipyards they had been called upon to discipline people outside of working hours who were inclined to drive fast, or drink, or something like that, *to try to keep them working,* because the government said, 'Unless you straighten your man out he can't work here.' And it was a defense of the C.I.O. by Mr. Lynden, naturally, and their policies, and resentment on the part of Mr. Sherman, who was a former Business Agent, and whether he was disappointed or what I couldn't say, but at any rate, he was obviously not in sympathy with C.I.O." (Italics ours.)

(R. 545.)

(e) At page 12 of the Board's brief, mention is made of the bulletin issued by the C.I.O. warning against participation in an illegal strike. This is another example of careful culling on the part of the Board. The complete text of this bulletin is set forth at page 44 of Petitioner's opening brief and an examination thereof reveals that it is in substance a warning againgst aligning with the "unscrupulous people who are attempting to promote strike action at this plant." This is a case of deliberate misdescription for the purpose of creating the impression that this was solely a threat of loss of jobs.

## II.

### INACCURACIES IN THE BOARD'S STATEMENT OF THE FACTS IN ITS ARGUMENT.

In its argument on the facts, at pages 47 and 48 of its brief, the Board states:

> "Finally, Labor Relations Director Wood admitted at the hearing, *without making any differentiation among the various groups of discharges and refusals to reinstate,* that he thought one of the reasons for the C.I.O.'s action was the anti-C.I.O. activity of the A.F.L. adherents." (Italics ours.)

In making this statement, the Board has failed to note that Mr. Wood, in failing to make a "differentiation" between groups of employees, properly did so because he was answering a series of questions relating to the group of eighteen who were discharged on or about September 1, 1945, and that he was in no way referring to employees discharged on prior occasions. In this connection, the attention of the Court is called to what appears in the record, pages 732-737, inclusive.

The Court will note that this alleged failure to make a differentiation between the discharges of various groups by Mr. Wood is one of the keystones to the Board's argument that the Petitioner knew of the CIO's alleged discriminatory intent when it discharged and refused reinstatement to the stewards and the committeemen. It is submitted, therefore, that the Board cannot rely on this portion of the record to support its argument.

(b) In attempting to change the plain meaning of the telegrams which are in evidence as the Board's Exhibits 5 and 6, the Board argues as follows:

> "Moreover, the suggested construction glosses over the phrase reading 'severed relations with I.L.W.U.-6 *as collective bargaining agent.*' (Italics supplied.) This is the key to the interpretation of the telegram and indicates the meaning which was ascribed to it by all, including the employer and the C.I.O. Its purport and intent, and the employer so understood it, was to express the desire of a majority of the employees to replace the C.I.O. as bargaining representative. As explained by Committeeman Sherman in his testimony: 'It was not the intent of the telegram to segregate individuals as discontinuing affiliations with the C.I.O. The intent of the telegram was that we were discontinuing the bargaining agency, forming another group.'" (Board's Brief, page 53.)

In making this argument, the Board fails to note that the Trial Examiner ruled that the Petitioner was not bound by the construction which the witness Sherman placed upon the telegrams, and that the Board affirmed this ruling. (R. 399-401; 68.)

The Petitioner not being bound by the witness's construction of the meaning and intent of the telegrams, it is clear that the Petitioner is entitled in this proceeding to have them considered in accordance with their plain and ordinary meaning. This being so, the telegrams are evidence of the fact that certain of Petitioner's employees had withdrawn from the CIO for every purpose and that the contention that

these telegrams were intended merely as a notification of dual unionism by the employees cannot stand.

(c) In attempting to nullify the effect and significance of the telegrams announcing the employees' withdrawal from the CIO, the Board argues as follows:

> "The Board correctly concluded (R. I, 78, n. 8): 'As for the complainants' withdrawal from the C.I.O., which would ordinarily entitle the [employer] to discharge them in view of the closed-shop contract, it will be observed that the C.I.O. did not accept their withdrawals nor is there any evidence that the [employer] discharged them or rejected the reinstatement application of the stewards and the committeemen for that reason. On the contrary, the [employer's] answer and evidence show beyond dispute that the [employer] acted because of the complainants' suspension by the C.I.O. pending determination of charges of anti-C.I.O. activity, and that the attempted withdrawals played no part therein. *Apparently the significance of the "withdrawals" occurred to the [employer] for the first time in its brief to the Trial Examiner after the close of the hearing.*' The employer's belated effort to imbue this inartistically drawn telegram with significance which it does not possess injects into the proceedings an issue which does not exist." (Board's Brief, pp. 53-54.) (Italics ours.)

The statement that the significance of the "withdrawals" occurred to the "employer" for the first time in its brief and that any argument thereon is an after-thought is a palpable mistatement of the

record which has already been called to the Board's attention. (Petitioner's Motion to Reconsider, p. 30; Document No. 16, listed in the Board's Certificate, R. 88.) The following taken from the record definitely shows that petitioner's contention with respect to the withdrawal of employees is not an after-thought:

> "Mr. Hecht. Mr. Examiner, before the question is answered I would like to object to any more statements as to change of unions. It is obvious Exhibits 5 and 6 show all these people intended to change unions, and, as a matter of fact, changed unions by reason of these wires, at least, severed their relations, and whatever they said later on as to the changed unions is not material here." (R. Vol. II, p. 491.)

In addition, the record shows that at the close of the Board's case, counsel for the C.I.O. made a motion to dismiss the proceeding on the ground that the employees had "withdrawn" from the contracting Union. (R. 664.) Under such circumstances, the contention that the Petitioner's argument is an "afterthought" cannot stand.

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## III.

### THE BOARD PERSISTS IN DISTORTING THE RECORD THROUGH INVALID INFERENCES.

In the Petitioner's opening brief, attention was called to the fact that in order to bolster its case, the Board relied on invalid inferences. (Petitioner's Brief, pp. 95-98; 105; 111-118.) The Board, although it does not dispute the validity of the legal objections

raised by Petitioner against findings based on invalid and prohibited inferences, is not daunted and repeats this performance in its brief. Thus, we quote therefrom the following statements:

> 1. "The Board concluded that the employer would not have authorized so important an interruption in the plant's operations without ascertaining the purpose of the meeting." (Board's Brief, p. 7.)
>
> 2. "That so important an interruption in production, apparently unprecedented, would be authorized to facilitate an employees' meeting without managerial ascertainment of its purpose is, to say the least, highly unlikely." (Board's brief, p. 44.)
>
> 3. "Because of the Board's practice promptly to inform persons of charges filed against them, the Board inferred that the employer was apprised of this charge by August 17, 1945." (Board's Brief, p. 15.)

With respect to items 1 and 2, we have already pointed out that the Board's counsel could have elicited direct testimony, had he so desired, as to whether the Petitioner was told or had ascertained the permissive anti-CIO purpose of the meeting. As to item 3, which is a new thought, it can also be pointed out that the Board cannot rely on inference because it is patent that the Board's employees in its San Francisco office were available to testify as to whether or not the Petitioner was promptly informed in accordance with Board practice as to the charges lodged against it. Under such circumstances, on the author-

ity of *Galloway v. United States* (1943), 319 U.S. 372, 87 L.Ed. 1458, the Board cannot be permitted to rely on inferences or on its "expertness" to sustain these findings.

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## IV.

### THE BOARD MISCONCEIVES PETITIONER'S ARGUMENT CHALLENGING THE SOUNDNESS OF THIS COURT'S APPROVAL OF THE RUTLAND COURT DOCTRINE IN THE LOCAL 2880 CASE.

The Board contends that our argument challenging the soundness of the doctrine announced in *Matter of Rutland Court Owners,* 44 N.L.R.B. 587, is invalid because we have failed to distinguish between the Board's inability, under the Wagner Act, to reach the contracting union's *independent wrong-doing* and the employer's answerability under said Act, for his wrong-doing in acceding to the request for the discharge of employees because of activity on behalf of a rival union. (Board's Brief, pp. 28; 33-36.)

The key to the Board's misconception of our argument lies in the charge that a contracting union is guilty of "wrong doing" and "wrongful acts" in demanding and obtaining, under the terms of a closed-shop contract, the discharge of employees because of their activity on behalf of a rival union. Unless such alleged "wrong doing" is premised or postulated, it is a logical and practical absurdity to say that the Board can interfere with, suspend or prevent the performance of an admittedly valid contract through

orders directed solely at the employer. It must be remembered that such a contract is the property of the contracting union (*M. & M. Wood Working Co. v. N.L.R.B.* (1939), 101 Fed. (2d) 938), and that the practical effect of orders, such as the one issued in this case, is to suspend the operation of the closed shop provisions of the contract which are intended to be for the direct benefit of the contracting union. It also must be remembered that the portions of the Board's order requiring the reinstatement of the discharged employees effects a violation of this contract, because compliance therewith will result in the employment by Petitioner of persons not in good standing with the contracting union. The effect of such reinstatement would, therefore, be to deprive the CIO, unless it be guilty of "wrong-doing", of property without due process of law.

That such wrong-doing is essential to the validity of the Board's doctrine is borne out by the fact that this Court's approval thereof in *Local 2880, etc. v. N.L.R.B.* (1946), 158 Fed. (2d) 365, is premised on the following proposition:

A labor organization which so coerces an employee as to cause him to exercise the rights guaranteed by Section 7 of the Wagner Act *in terrorem of discharge* is ineligible to become or remain a party to a closed shop contract, and a discharge by the employer pursuant to a closed shop contract vitiated by the ineligibility of the coercing union, is assistance of the type defined by the Act as an unfair labor practice.

In other words, this Court has held that a closed shop contract is destroyed because of the contracting union's "wrongful" acts.

It is submitted that until the passage of the Taft-Hartley Act, it was generally held that a contracting union was not guilty of wrongful conduct in securing the discharge of employees because of activity on behalf of a rival union, and that there was nothing in the Wagner Act proscribing or outlawing such conduct. In support of the first branch of the foregoing contention, we refer the Court to Sections 810 and 811 of the "Restatement of the Law of Torts". In support of the second branch of this contention, we submit that the Board admits that there was nothing in the Wagner Act which made illegal or prohibited such activity on the part of the contracting union. In *Matter of Lewis Meier & Company* (1947), 73 N.L.R.B. 520, at 523, the Board said:

> "Moreover, it appears from the legislative history of the Act that Congress rejected the concept that labor organizations should be made amenable to Section 8 thereof. The respective committee reports to both the Senate and the House of Representatives mention proposals for prohibiting labor organizations, as well as employers, from engaging in activities defined in Section 8 as unfair labor practices. *Indeed, attention was explicitly called to the possibility of arbitrary use of the closed shop by labor organizations, and specific proposals were made for its avoidance. Congress, however, refused to include any of these proposals in the Act as written.*" (Italics ours.)

Since it is plain that the contracting union has not been guilty of any wrongful conduct in exercising its rights under a closed shop contract, it is submitted that it is impossible to contend that such a contract is unenforceable or that the operation thereof may be suspended by Board order. Therefore, it must be granted that the employer is legally unable to refuse compliance with such a contract and that it is unjust to exact penalties from it because it has been compelled to perform a legal obligation.

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## V.

### THE BOARD'S CONTENTIONS THAT ITS DECISION DOES NOT REQUIRE THE PETITIONER TO ASSUME THE ROLE OF JUDGE AND INQUISITOR ARE CONTRADICTED BY THE CONTENTS OF ITS BRIEF AND BY ITS DECISIONS.

The Board's contention that its decision does not place the employer in the role of judge is untenable. The Petitioner in this case is called upon to "'distinguish,' 'interpret,' 'explain,' 'reconcile,' often with a finesse that would have delighted the angelic and subtle Doctors of the Middle Ages or the rabbinical pundits of Sora and Pumbeditha."[1] In proof of this, we offer for the Court's consideration the contentions made by the Board, at pages 51-61 of its brief, and in particular to the Board's tortured argument with respect to the language contained in the telegrams, which are in evidence as Board's Exhibits 5 and 6,

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[1] "The Good Judge of Chateau-Thierry", 10 Cal. Law Rev. 300, at 305.

and to the language of the original charge filed with the Board.

On the subject whether an employer is required to act as an inquisitor or investigator, the Board contends:

> "Nor does the Board's decision, as the employer appears correlatively to contend, place upon the employer an implicit burden to seek out information. An employer is not required before complying with a discharge demand under a closed-shop agreement to conduct an investigation, to delve into the union's books and policies, or to police the union's conduct of its internal affairs." (Board's Brief, p. 38.)

The answer to this is that the Board expressly places on the employer, in situations similar to that involved in this case, the burden of seeking out information and requires him to delve into a union's conduct of its internal affairs. In proof of this, we quote from two decisions of the Board.

> "For, although Halderman was thus admittedly aware that the discontent among his co-workers was due, in part at least, to Clark's rival union membership, and although, according to Nichols' testimony, Halderman asked for 'a little more proof of why the boys were refusing to work with (Clark) before he * * * discharged' him, *it failed to make such a reasonable investigation of the facts as the circumstances of the case required. * * * Significantly there is no evidence that the respondent pursued the inquiry any further or that Halderman inquired among employ-*

> *ees of the disgruntled crew.*" (Italics ours.) *Matter of Pillsbury Mills, Inc.* (August, 1947), 74 N.L.R.B. 1113, at 1116.
>
> "We find, therefore, that the respondent knew at the time of the discharge that these men would not have been expelled from the Union had it not been for this activity. *Certainly, it made no effort to determine from the CIO the extent, if any, to which dual unionism was considered in determining the penalty.*" (Italics ours.) *Matter of Durasteel Company* (May, 1947), 73 N.L.R.B. 941, at 945.

In connection with the foregoing, it should be borne in mind that the Board requires not "perplexity" or "incertitude" but "knowledge" with respect to the contracting union's motivation before applying the principle of the *Rutland Court* case.[2]

On the other hand, the Labor Management Act, 1947, requires a less strict standard to be adhered to in cases where a discharge is sought because of non-membership in a labor organization. The proviso of Section 8(3) of the Labor Management Act, 1947, recites that no employer shall justify any discrimination against an employee "if he *has reasonable grounds* for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring

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[2] *Matter of Spicer Manufacturing Corporation* (1946), 17 N.L.R.B. 41;
*Matter of Diamond T Motor Car Company* (1945), 64 N.L.R.B. 1225;
Board's brief in *Local 2880, etc. v. N.L.R.B.*, pp. 22, 24.

or retaining membership." There is a vast distinction between "knowledge" and "reasonable belief". "Knowledge" connotes a more certain and definite mental attitude than "reasonable belief".[3]

Accordingly, the standard set up by Congress in the Labor Management Act, 1947, does not require an employer to assume the role of a judge or an inquisitor, as does the standard set up by the Board and for this reason, it is respectfully submitted that Congress, in amending the National Labor Relations Act, has expressly determined that an employer shall not be subjected to the burdensome tasks and responsibilities which the Board has sought to impose in cases of this type.

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## VI.

### THE BOARD'S CONSTRUCTION OF A CLOSED SHOP AGREEMENT IS NOT CONSISTENT WITH CALIFORNIA LOCAL LAW AND THE BOARD'S INTERPRETATION CANNOT BE PERMITTED TO OVERRIDE LOCAL LAW.

The Board argues that under California law, a request for the discharge of employees, who would destroy the contracting union through activity on behalf of a rival union, is illegal and discriminatory conduct. (Board's Brief, pp. 64-65.) Such an argument is untenable and does not find support in any of the California cases cited by the Board.

The Board also argues that assuming California law permits conduct inconsistent with its interpreta-

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[3]*State v. Miller* (1937), 193 S.E. 388, 212 N.C. 361.

tion of the Wagner Act, the local law must yield to the Board's legislation. (Board's Brief, pp. 65-66.) This argument is a reiteration of the Board's contention with respect to the exclusive nature of the Wagner Act and its right to administer it without regard to other laws, whether Federal or State, and its asserted right to disregard the consequences of its decisions. This insistence upon exclusiveness and independence in the administration of the Wagner Act has involved the Board in severe collisions with the Courts[4], and in at least two important cases, the Board's attempt to override all other laws has been effectively frustrated. We have in mind the cases of *N.L.R.B. v. Fansteel Metallurgical Corporation* (1939), 306 U. S. 240, 83 L. Ed. 627, and *N.L.R.B. v. Southern Steamship Co.* (1942), 316 U. S. 31, 86 L. Ed. 1246. In the last cited case, the Supreme Court rejected the Board's view that sailors who had mutinied, notwithstanding the illegality of their actions, could be directed to be reinstated with back pay upon a finding that their employer had discriminated against them in violation of the Wagner Act. In rejecting the Board's decision, the Supreme Court said:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act *so single-mindedly* that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional pur-

[4] "A Labor Policy for America", Teller (Baker, Voorhis & Co., 1945), p. 38.

pose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation *without excessive emphasis upon its immediate task.*" (Italics ours.) (*Southern Steamship Co. v. National Labor Relations Board,* 310 U. S. 46, 86 L. Ed. 1259.)

The foregoing admonition given to the Board by the Supreme Court suffices to establish that the Board is not empowered to deprive a union which has not committed any wrongful or illegal act of its property rights in violation of the Fifth Amendment to the Federal Constitution.

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## VII.

### LEGAL PROPOSITIONS ADVANCED IN PETITIONER'S BRIEF WHICH THE BOARD HAS CONCEDED BY ITS FAILURE TO COMBAT THEM.

Several legal propositions set forth in Petitioner's brief which establish the illegality of the Board's decision and order have not been rebutted by the Board and, in some instances, have not even been mentioned and are, we submit for this reason, conceded to be correct by the Board.

These legal propositions are the following:

(a) It is no defense to the performance of a contract that the obligor knows that the agreement or its performance might aid the obligee to violate the law (Petitioner's Brief, pp. 78-80).

(b) An act lawful in itself is not converted by a malicious or bad motive into an unlawful act (Petitioner's Opening Brief, pp. 87-91).

(c) The Board's conclusionary finding that Petitioner made no bona fide effort to evaluate the evidence is based on an invalid presumption, disregards a valid presumption and is contrary to the record (Petitioner's Opening Brief, pp. 111-120).

Dated, San Francisco, California,
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